

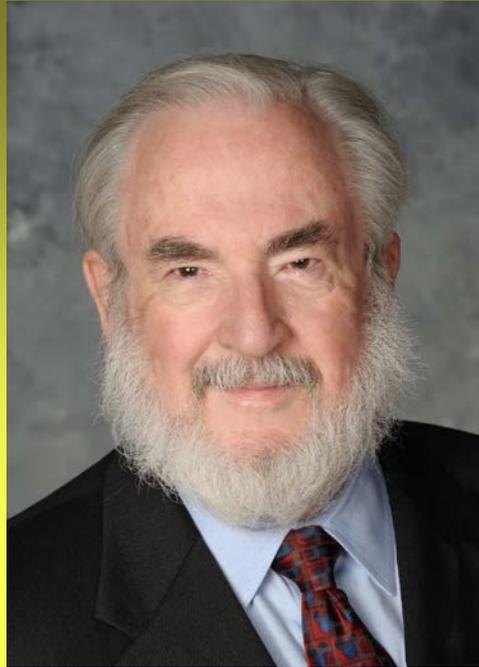
# **Open Public Records Act**

## **Exceptions Under the Law**

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**A NJ League of Municipalities Webinar**

**March 9, 2016**



**William J. Kearns, Jr.**

**Helmer, Conley & Kasselmann, P.A.**

**Willingboro, New Jersey**

**General Counsel, New Jersey League of Municipalities**

# Open Public Records

BOROUGH OF RIDGEFIELD  
Bergen County, New Jersey

Meeting December 26, 2001

Presented by Mayor Stewart V. Veale

## RESOLUTION NO. 335-2001

WHEREAS, Falun Dafa, also known as Falun Gong is considered to be a form of exercise that draws energy into the body in order to maintain health and a peaceful approach to life; and

WHEREAS, the United States Government is now on record as "deeply disturbed" by reports that China has further intensified its repression of Falun Dafa adherents; and

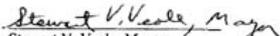
WHEREAS, this summer thousands of Falun Dafa supporters have marched through the Atlantic States on their way to Washington in order to protest the Chinese Government's persecution of Falun Dafa followers; and

WHEREAS, the Chinese Government's actions against Falun Dafa practitioners represent a severe example of violating human rights and civil liberties;

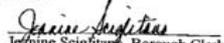
NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council of the Borough of Ridgefield that support be given to those who follow the peaceful example of Falun Dafa members, and further that harsh, brutal and repressive practices of the Chinese Government against Falun Dafa followers be condemned, and that all Falun Dafa prisoners be freed by the Chinese Government; and

BE IT FURTHER RESOLVED that a certified copy of this Resolution be forwarded to the Honorable George W. Bush, President of the United States of America, the Honorable Colin L. Powell, Secretary of State, United States of America, The Honorable Jon Corzine, United States Senate, the Honorable Robert G. Torricelli, United States Senate, the Honorable Steven Rothman, United States House of Representatives, the Honorable Donald DiFrancesco, Acting Governor, State of New Jersey, the Honorable Yang Jiechi, Ambassador of the People's Republic of China, Washington D.C., the Honorable Zhang Hongxi, General Consul, the People's Republic of China, New York, New York and the Honorable Mayors of Shijiazhuang City, Herbei Province and Nantong City, Xuzhou City of Jiangsu, Province of the People's Republic of China.

Approved:

  
Stewart V. Veale, Mayor

Attest:

  
Joanne Sciglitano, Borough Clerk

### COUNCIL VOTE

	YES	NO	ABSTAIN	ABSENT
Suarez	X			
Aslar	X			
Trifari	X			
Catherina				X
Bonardi	X			
Accosta	X			
Mayor Veale				

# Open Public Records

It's OPRA

**O**PEN

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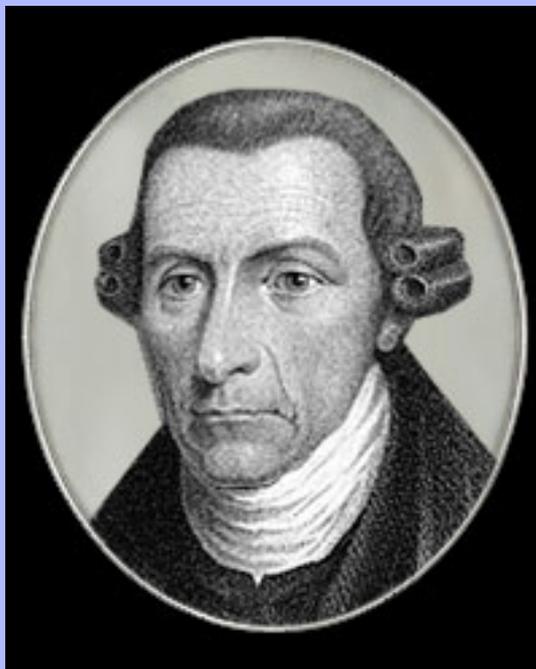
**R**ECORDS

**A**CT

# Open Public Records

Not ..... OPRAH





Patrick Henry

*"The liberties of a people never were,  
or ever will be, secure when the transactions  
of their rulers may be concealed from them."*

# Open Public Records

## What is a Public Record?

- If you have it, it is a public record, unless it falls under an exception.
- Agendas, Minutes, Resolutions, Ordinances, Contracts, Bid Documents, Reports, Correspondence, E-mail messages are all included.

# Open Public Records

## What is a Public Record?

A public record is ...

- any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document,
- information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof,
- that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or
- that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.
- The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

# Open Public Records

## Responding to a request

- The Municipal Clerk **is** the Custodian of Records;
- Must respond within 7 days with the record or with a response that states when the record will be available;
- The Clerk can be fined for failure to comply with the OPRA requirements.
- **Anyone who interferes with compliance can be fined.**
- The request must identify the record requested.
- If the record does not exist, OPRA does not apply.
- There is no requirement to research or to create a record.
- **There is NO exception for records that might be embarrassing.**

# E-MAILS

- E-mails are public records so long as they are “made, maintained or kept on file in the course of his [or her] or its official business.” They include emails from both governmental and personal email addresses.
  - *297 Palisades Avenue Urban Renewal Company LLC v. Borough of Bogota*
    - *NJ Superior Court, Law Division, Bergen County*
      - *March 26, 2014*
      - *Hon. Peter E. Doyne, A.J.S.C.*

# THE PERILS OF E-MAIL

- “Time for some traffic problems in Fort Lee”

Bridget Anne Kelly

- “Got it.”

David Wildstein

Both emails sent from personal accounts

# Open Public Records

## QUESTION 1

# Open Public Records

## What is **Not** a Public Record?

- Information received by a member of the **Legislature** from a constituent;
- Autopsy photos, except as used in Court or for medical or forensic education;
- Trade secrets, proprietary commercial or financial information;
- Attorney-Client items, except that billing records are public records;
- Information which would jeopardize computer security
- Emergency or security information for buildings which could jeopardize the security of the buildings or the safety of individuals;
- Security measures and surveillance techniques

# Open Public Records

## What is **Not** a Public Record?

- Criminal Investigatory Records; Victim's Records

*North Jersey Media Group v Lyndhurst*, App Div 2015 held that almost every record from a criminal investigation is confidential.

But ..... Record must be made as part of the investigation. Dash cam video made before investigation began are not confidential. *Paff v Ocean County Prosecutor's Office*, Law Division, Oct 2, 2014.

The exception for victim's records is designed to protect victims and is of particular importance in domestic violence cases.

# Open Public Records

## What is **Not** a Public Record?

- Information which would give an advantage to bidders;
- Information in connection with any sexual harassment complaint or any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;
- Information required to be confidential by a court order;
- Social Security Number, Credit Card Number
- Unlisted Telephone Number;
- Driver License Number

# Open Public Records

## What is **Not** a Public Record?

- Personnel and pension records are confidential
- **EXCEPT** that the following are public:
  - Name
  - Title
  - Position
  - Salary
  - Payroll Record
  - Length of Service
  - Date of Separation and Reason for Separation
  - Amount and Type of any Pension

# Open Public Records

## QUESTION 2

# Open Public Records

## What is **Not** a Public Record?

Draft documents, drafts of minutes

- *Parave-Fogg v Lower Alloways Creek Township*, Government Records Council, 2006, holding that minutes are advisory, consultative or deliberative material until approved.
- **BUT note current litigation, *Paff v Moorestown*, filed February 9, 2016, over unapproved minutes from a meeting of the local ethics board held on October 19, 2012. The Board only meets as needed and has not met even to approve minutes.**

# Open Public Records

## Record does not exist

- Requestor seeks a record that does not exist, i.e., a log of all e-mail messages between certain dates involving specific officials.
- Municipal Clerk denies the request on the grounds that no such record exists.
- Requestor sues to compel the creation of the e-mail log.
- Court rules that the creation of the e-mail log would be no substantial burden to the municipality and orders that it be created and provided.

Paff v Galloway Township  
NJ Superior Court, June 10, 1914

# Open Public Records

## What is **Not** a Public Record?

- Internal memoranda
- Budget drafts, departmental requests (*Tonia Hobbs v Township of Hillside*, GRC 2009-286)

# Open Public Records

## What is **Not** a Public Record?

- Items that are inter-agency or intra-agency advisory, consultative, or deliberative – but that means recommendations and opinions **NOT** simply factual material.
- *In Re Liquidation of Integrity Insurance Co.* 165 NJ 75 (2000)

# Common Law Right of Access

- Support for access to public records stretches well back in the common law. Earliest NJ decision dates from 1879 (*Ferry v. Williams*, 41 N.J.L. 332) and relies on the English common law.
- Standard for access: Citizen entitled to inspect documents of a public nature provided he/she shows the requisite interest therein.

# Records Required to be Maintained

- **Public Record:** one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence, of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office ...the elements essential to constitute a public record are...that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it. Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954) as cited in Nero v. Hyland, 76 N.J. 213 (1978).
- Examples: Accident Reports, Assessment Records, Municipal Hearings, Voter Registration Records, Tax Records, Meeting Minutes (except executive session), Background Investigations, Budgets, Law Enforcement Investigative Reports.

# Interest in the Records Requested

- 
- Requisite Interest: Threshold condition for access is that citizen establish an interest in the subject matter of the material sought. Interest does not have to be purely personal. Rather a citizen or taxpayer may be accorded access, when concerned with a public issue, even though individual interest may be slight. Irval Realty, Inc. v. Board of Public Utility Commissioners, 61 N.J. 366, 372 (1972).
- 
- Examples: Citizen access to list of registered voters (Higgins v. Lockwood, 74 N.J.L. 158 (Sup. Ct. 1905)), Casey v. MacPhail, 2 N.J. Super. 619 (Law Div. 1949)); defense of reputation (Nero v. Hyland, supra,); newspaper's interest in keeping an eye on public agency proceedings (Red Bank Register v. Board of Educ., 206 N.J. Super. 1, 9 (App Div. 1985)).

# Balancing Test

- The right of access, once requisite interest and the public nature of the document are determined, is not unfettered. There must be a careful balancing of the agency's interest in confidentiality against the public interest in disclosure, including a consideration of whether the “demand for inspection is premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.”
- Loigman v. Kimmelman, 102 N.J. 98, 112 (1986); South Jersey Publishing Co. v. N.J. Expressway Auth., 124 N.J. 478 (1991); Atlantic City Convention Center v. South Jersey Publishing Co., 135 N.J. 53 (1994).

# OPRA –vs- Common Law

- Common law right of access is unaffected by OPRA. They operate independent of each other. Many requests for records now assert both laws. Thus, any response must consider both when preparing a reply.

# Investigatory Records

- Exempt where the investigation by any public agency is in progress and the release of the documents would be inimical to the public interest. (N.J.S.A. 47:1A-3)
  - **BUT** - the records are not exempt where the investigator is a municipal official or individual acting on his/her own.

297 PALISADES Avenue Urban Renewal LLC v. Borough of Bogota

# Open Public Records

## Privacy Concerns

**What about ....**

**E-Mail**

**E-Mail Addresses?**

**Records concerning Minors?**

**What is the reasonable expectation of privacy?**

# Privacy Concerns

Data such as Social Security numbers, credit card numbers, unlisted telephone numbers and driver license numbers are generally exempt from disclosure.  
(N.J.S.A. 47:1A-1.1)

Where there is a reasonable expectation of privacy of personal data given to a governmental agency, the court will perform a balancing test to determine whether the information should be released.

Bolkin v. Borough of Fairlawn, Docket No. BER-L-6547-12 (Law Div., Dec. 5, 2012)

# Open Public Records

## Privacy Concerns

**See the report of the  
New Jersey Privacy Study Commission**

**<http://www.nj.gov/privacy/>**

# Open Public Records

## Settlement Agreements

### **Confidentiality Provisions**

#### **Public right to know prevails**

*Asbury Park Press v Monmouth County*

*NJ Supreme Court, Jan 25, 2010*

#### **Counsel Fees**

*Paff v West Deptford, App Div, Feb 18, 2010*

# Open Public Records

## Other Concerns

**What about ....**

**Cell Phone Numbers**

**Building and Architectural Plans**

**Land Use Plans - Engineering Data**

**Copyright Issues**

# Open Public Records

## Custodian Seeks Legal Advice

**It is appropriate for the custodian to seek legal advice in order to respond to a request, BUT that does not mean that the custodian does not have to respond within the 7 days. The custodian must advise the requestor that additional time is needed, and indicate how much time is required to respond to the request.**

***Richard Rader v. Township of Willingboro, GRC Complaint No. 2007-239, decided June 25, 2008***

# Open Public Records

## Going to Court

**Superior Court has Jurisdiction**

**BUT**

**Complaint must be filed within 45 days of the denial of access to the requested record.**

*Mason v. City of Hoboken, NJ Supreme Court, July 22 2008*

**While there is a 45 day limitation on filing in Superior Court, the Government Records Council has no such restriction. Thus, a complaint to the GRC may be filed at any time.**

*Knehr v. Township of Franklin,  
GRC Complaint No. 2012-38 (Dec. 18, 2012)*

# Open Public Records

## QUESTION 3

**Thank you for your attention,**



**That's all, folks!**